Khumaravelu a/l Thanimalai v Edwine Soo Yeong Huan and another appeal

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NOS 12B-266 OF 2011 AND 12B-268 OF 2011
CHEW SOO HO JC
17 FEBRUARY 2012

Damages (Personal Injury or Death) — Appeal — Appeal against award made — Whether sum awarded for pain and suffering inordinately high — Whether separate award should be given for arthritis resulting from injury — Whether sessions court erred in failing to consider evidence on loss of earning capacity despite evidence to that effect by specialist — Whether appellate court's intervention justified

The appellant in Civil Appeal No 12B-266-2011, Khumaravelu a/l Thanimalai ('plaintiff') suffered personal injuries in a road accident in which the van he was driving was involved in a collision with a car driven by the appellant in Civil Appeal No 12B-268-2011, Edwine Soo Yeong Huan ('defendant'). Both the appeals herein related to the quantum of damages the plaintiff had obtained, or failed to obtain, at the trial in the sessions court. That court had awarded the plaintiff RM25,000 for pain and suffering made up of RM15,000 for toe injuries, RM5,000 for K-wire fixation and another RM5,000 for muscle wasting. Although a specialist's report had been tendered showing the plaintiff suffered an estimated 30% loss in earning capacity due to his injuries (a fact not rebutted by the defendant), the sessions court failed to consider this head of damages. On the award for pain and suffering, the plaintiff contended the sessions court should have given him an additional RM10,000 for arthritis resulting from the injury. The defendant, on the other hand, submitted the RM25,000 award was excessive and that a global sum of RM12,000 was fair and reasonable. As for loss of earning capacity, the defendant suggested RM15,000 was a fair amount.

Held, disallowing the additional claim for RM10,000 for arthritis, quashing the RM5,000 awarded for K-wire fixation, and awarding RM55,000 for loss of earning capacity with interest at 4% from date of judgment to date of realisation:

(1) There was no need for a separate award for arthritis. The RM15,000 awarded by the sessions court for pain and suffering must have taken into account not only the fracture and dislocation of the metatarsal of the right foot but also the arthritis and the other disabilities. That sum was not inordinately high as to be out of line with the discernible trend or pattern of awards to merit intervention (see para 4).

(2) There was no additional pain and suffering which necessitated a separate award of RM5,000 for the K-wire fixation. The fixation was part and parcel of the treatment when the plaintiff was admitted to hospital. It was unlike a case where an injured had to undergo a subsequent operation which might aggravate his pain and suffering (see para 5).

(3) The sessions court erred in failing to consider the evidence on loss of earning capacity which justified intervention by this court. In all the circumstances, RM55,000 was a fair and reasonable award for loss of earning capacity (see para 7 & 8).

[Bahasa Malaysia summary

Perayu di dalam Rayuan Sivil No 12B-266 Tahun 2011, Khumaravelu a/l Thanimalai ('plaintif') mengalami kecederaan diri dalam kemalangan jalan raya di mana van yang dipandunya terlibat dalam perlanggran dengan kereta yang dipandu oleh perayu di dalam Rayuan Sivil No 12B-268 Tahun 2011, Edwine Soo Yeong Huan ('defendan'). Kedua-dua rayuan di sini berkaitan kuantum ganti rugi yang diperolehi oleh plaintif, atau gagal diperolehi, di perbicaraan di mahkamah sesyen. Mahkamah tersebut telah mengawardkan plaintif RM25,000 untuk kesakitan dan penderitaan iaitu RM15,000 untuk kecederaan jari kaki, RM5,000 untuk pemasangan K-wire dan RM5,000 lagi untuk 'muscle wasting'. Walaupun laporan pakar telah dimasukkan menunjukkan plaintif mengalami kehilangan keupayaan pendapatan yang dianggarkan sebanyak 30% akibat kecederaannya (fakta yang tidak dipatahkan oleh defendan), mahkamah sesyen gagal untuk mempertimbangkan ganti rugi ini. Atas award untuk kesakitan dan penderitaan, plaintif berhujah mahkamah sesyen patut memberikannya tambahan sebanyak RM10,000 untuk artritis akibat kecederaan tersebut. Defendan, sebaliknya, berhujah bahawa award RM25,000 tersebut adalah berlebihan dan bahawa jumlah global sebanyak RM12,000 adalah adil dan munasabah. Untuk kehilangan keupayaan pendapatan, defendan mencadangkan RM15,000 adalah jumlah yang adil.

Diputuskan, tidak membenarkan tuntutan tambahan untuk RM10,000 bagi artritis, membatalkan RM5,000 yang diawardkan untuk pemasangan K-wire, dan mengawardkan RM55,000 untuk kehilangan keupayaan pendapatan dengan faedah pada 4% dari tarikh direalisasikan:

(1) Tidak perlu award berasingan untuk artritis. RM15,000 yang diawardkan oleh mahkamah sesyen untuk kesakitan dan penderitaan mesti diambil kira bukan sahaja terhadap bahagian patah dan metatarsal kaki kanan yang terkehel tetapi juga artritis tersebut dan ketidakupayaan lain. Jumlah tersebut bukan tinggi seperti terkeluar daripada batasannya dengan perkembangan yang dapat dilihat atau corak award untuk mewajarkan campur tangan (lihat perenggan).

(2) Tidak terdapat kesakitan dan penderitaan yang mana memerlukan award

berasingan sebanyak RM5,000 untuk pemasangan K-wire. Pemasangan tersebut adalah sebahagian daripada rawatan apabila plaintif dimasukkan ke hospital. Ia bukan seperti kes di mana seseorang yang tercedera terpaksa menjalani pembedahan berikutnya yang mana mungkin akan memburukkan kesakitan dan penderitaannya (lihat perenggan).

(3) Mahkamah sesyen tersilap kerana gagal untuk mempertimbangkan keterangan atas kehilangan keupayaan pendapatan yang mana menjustifikasikan campur tangan mahkamah ini. Dalam semua keadaan, RM55,000 adalah award adil dan munasabah untuk kehilangan keupayaan pendapatan (lihat perenggan).]

Notes

For cases on appeal against award made, see 6 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 369–373.

Cases referred to

Chen Siew Choo & 5 Ors v Ab Razak bin Ab Rahim & Anor [2010] 2 PIR [65] (folld)

Kumaran a/l Pannerselvam & Anor v Ng Wee Khim & Anor [2011] 2 PIR [34] 183 (refd)

Mahmod bin Kailan v Goh Seng Choon & Anor [1976] 2 MLJ 239, FC (folld)

Mohd Mar bin Ismail v Chan Chiao Hwa [2011] 1 PIR [30] (refd)

Saiful Amin bin Subhan v Mohamad Salleh bin Kamarudin & Anor [2011] 1 PIR [23] (refd)

Samsuri bin Saad & Anor v Chew Kit Toh (t/a Kit Thong Woh Hup) and another appeal [1996] 1 MLJ 576, HC (refd)

Topaiwah v Salleh [1968] 1 MLJ 284, FC (refd)

United Plywood And Sawmill Ltd v Lock Ngan Loi [1970] 2 MLJ 237, FC (refd)

Baldev (Syarikat Baldev Bhar) for the appellant.
Jannu Babjan (Kumar & Co) for the respondent.

Chew Soo Ho JC:

THE APPEALS

[1] Civil Appeal No 12B-266 of 2011 was filed by the appellant/plaintiff against quantum of damages arising out of a road accident that occurred on 1 May 2008 at about 4.15am at 1.1 km at Penang Bridge, Penang between a motor van No PBS 780 where the appellant/plaintiff (Khumaravelu a/l Thanimalai) and three others named as the second, third and fourth respondents in Civil Appeal No 12B-2B8 of 2011 were travelling as passengers,

and motorcar No BHN 7032 driven by the respondents/defendant (Edwine Soo Yeong Huan). In Civil Appeal No 12B-268 of 2011, the appellant/defendant is also appealing against quantum. There has been issue of interest being raised but it was abandoned on the date of hearing of these appeals and consequent upon that, the second, third and fourth respondents/plaintiffs will no longer be involved. Thus, both the appeals herein relate solely to the issue of quantum which comprises of (i) closed fracture of fourth metatarsal with dislocation of fifth metatarsal cuboid point and (ii) loss of income/loss of earning capacity of the appellant/plaintiff or the respondent/plaintiff. For ease of reference, Khumaravelu a/l Thanimalai will be referred to hereinafter as 'the plaintiff' while Edwine Soo Yeong Huan will be referred to as 'the defendant' in both these appeals.

QUANTUM

Close fracture of fourth metatarsal with dislocation of third metatarsal cuboid point

[2] For this injury which the learned sessions judge awarded RM15,000, the plaintiff's only complaint is that learned sessions judge had failed to consider arthritis which is not claimed separately but as part and parcel of this foot injury. Referring to the case of *Kumaran a/l Pannerselvam & Anor v Ng Wee Khim & Anor* [2011] 2 PIR [34] 183, the plaintiff submitted that an award of RM10,000 should be made for arthritis. It is thus submitted that the quantum should be RM25,000.

[3] The defendant conversely submitted that the award is manifestly excessive because in addition to the award of RM15,000 for the toe injuries, the sessions court had also awarded separately a sum of RM5,000 for the K-wiring and another RM5,000 for muscle wasting making up a total of RM25,000 for the pain and suffering. It was contended that for the injuries to the toes, the general trend of award is between RM3,000 and RM4,000 referring to case of *Saiful Amin bin Subhan v Mohamad Salleh bin Kamarudin & Anor* [2011] 1 PIR [23], *Mohd Mar bin Ismail v Chan Chiao Hwa* [2011] 1 PIR [30] and *Chen Siew Choo & 5 Ors v Ab Razak bin Ab Rahim & Anor* [2010] 2 PIR [65]. Taking into consideration the arthritis changes, it was submitted that for the injury of closed fracture of the fourth metatarsal of right foot with dislocation of the right metatarsal cuboid point resulting in the various disabilities of walking with a limping gait, 3 cm muscle wasting, stiffness of the fourth and fifth toe, arthritic changes, pain of the right foot aggravated on standing and walking due to arthritis and restricting strenuous activities requiring standing and walking, a sum of RM12,000 would be fair and reasonable global sum of award.

[4] Having heard the submissions by both parties, I find that for a single

fracture to the metatarsal of the foot, the general trend of award is in the range of RM3,000–RM4,000. However, taking with consideration the arthritis changes in the tarsometatarsal joint of the right foot and that the arthritis will aggravate the pain of the right foot on standing and walking, coupled with the other disabilities, it seems to me that the sum of RM15,000 awarded by the learned sessions judge must have taken into account not only the fracture and dislocation of the metatarsal of the right foot but also the arthritis and the other disabilities. I do not find the learned sessions judge to have erred in awarding the said sum of RM15,000 for the said injuries with all the disabilities inclusive of the arthritis changes. I do not agree that there should be a separate award for arthritis which is tied directly to this injuries in addition to this sum which must have taken into account the injuries and disabilities as a whole. On the defendant's submission that the sum should be RM12,000 instead of RM15,000, the law is trite that an appellate court will not interfere simply because the figures awarded by the trial judge was greater or less than that which the appellate court would itself have awarded. It is only when the trial Judge has acted on a wrong estimate of the damage would the appellate court be entitled to interfere: see *Samsuri bin Saad & Anor v Chew Kit Toh (t/a Kit Thong Woh Hup) and another appeal* [1996] 1 MLJ 576; *Topaiwah v Salleh* [1968] 1 MLJ 284. Taking into consideration the various disabilities that the plaintiff had suffered, I do not find such award to be inordinately high to be out of line with discernible trend or pattern of awards to merit intervention; see *United Plywood And Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237 (FC).

[5] As to the K-wire fixation, specialist report at pp 167–169 appeal record (green volume) shows that the K-wire fixation was part and parcel of the treatment when the plaintiff was admitted to Bukit Mertajam Specialist Hospital for treatment on 1 May 2008. I do not find any additional pain and suffering which necessitates a separate award of damages unlike a case where an injured will have to undergo subsequent operation which may aggravate his pain and suffering. In the circumstances, I find no basis for the learned sessions judge to make this award of RM5,000 for the K-wire fixation. There is an error here and this award should be quashed; see *Mahmod bin Kailan v Goh Seng Choon & Anor* [1976] 2 MLJ 239 (FC). For muscle wastage for which the learned sessions judge awarded RM5,000, I do not find any error in such award and it shall remain.

Loss of income/loss of earning capacity

[6] Specialist report (p 198 appeal record — green volume) shows that the estimated loss of earning capacity of the plaintiff is about 30% and this percentage will remain in future. In this same report, the specialist also opined that the plaintiff should be able to continue with his occupation as a mechanic. There is no medical evidence to support the plaintiff's contention that he could

only do light duties which resulted in him leaving his mechanic job with Honda for a lesser salary job. As admitted by the plaintiff, he resigned from Honda for another job voluntarily. Thus, I find that the learned sessions judge is right in his findings of facts that there was no evidence to show that the plaintiff could not continue to work in his previous employment. It is thus unconceivable that plaintiff's reduced salary from another job in the circumstances can be the basis to entitle him to claim his loss of income which was as a result of his own volition. There is no error in this aspect of the learned sessions judge's finding.

[7] For the loss of earning capacity, it is apparent from the grounds of judgment that this had not been considered although the plaintiff's specialist report at p 198 appeal record had shown the loss of about 30% of plaintiff's earning capacity, which is unrebutted by the defendant. This failure is an error in the learned sessions judge's finding which justifies this court to intervene. The plaintiff's loss of earning capacity nevertheless cannot be construed to derive from the alleged loss occasioned by the plaintiff's voluntary changing of job from one of higher earnings to one of lower earnings on his own accord bereft of any medical evidence that it was due to his incapacity that he could not continue to work as he was and had to undertake perhaps a less strenuous job. Here evidence of the specialist is amply clear that the plaintiff should be able to continue with this occupation as a mechanic. The fact that he declined to continue is his own choice and not on account of the medical condition of his injuries. That cannot not be the basis for this claim of quantum. It will be contrary to clear medical evidence if the fact that the plaintiff's switching his job voluntarily to a lower earning one could qualify him to claim the difference in the earnings as his loss of income and/or loss of earning capacity which is certainly not well grounded.

[8] Learned counsel for the defendant had submitted that a sum of RM15,000 should be reasonable for the plaintiff's loss of earning capacity taking into account the whole case. Endorsing that the plaintiff will suffer about 30% loss of his earning capacity and although this court, so is the court below, is not satisfied that his reduction in salary on account of his voluntary change of job, can be the basis for such claim, it has to be accepted that the plaintiff would indeed sustain some loss arising from the about 30% loss of earning capacity which according to the specialist will remain in the future, I am of the view, in all circumstances, that a sum of RM55,000 should be a fair and reasonable sum for this loss. I disagree that the sum of RM15,000 as submitted by the defendant to be fair and reasonable sum for this head of claim for reason that taking into account the plaintiff's last earning being Singapore $1,200 which is equivalent to about RM2,880 per month at the exchange rate of RM2.40 and the fact the plaintiff's loss of earning capacity will continue in the future, this sum of RM15,000 is clearly too low an offer.

[9] The last item in this loss of income is the actual loss subsequent to the accident. The learned sessions judge had awarded three months calculated at Singapore $4531.44 x RM2.40 = RM10,875.50. The defendant referred to the letter from the plaintiff's employer dated 12 January 2011 (p 106 of the appeal record — red volume) to submit that the plaintiff's loss of income was only 12 days. From the table showing the plaintiff's leave taken between 22 May 2008–2 August 2008 which runs continuously, there is a total of 67 days of leave taken wherein 15.5 days were paid leave by the employer while the remaining 41.5 days were unpaid leave. According to the plaintiff's medical report from Bukit Mertajam Specialist Hospital (p 145 appeal record — green volume), the plaintiff was given medical leave from 1 May 2008–30 July 2008 when he was admitted for treatment on 1 May 2008 and discharged on 8 May 2008.

[10] Looking at his employer's letter dated 12 January 2011, the fact that the plaintiff had to apply for his annual leave with pay and with no pay during his three months of medical leave indicates that his employer did not take into consideration the plaintiff's three months medical leave and pay him for the medical leave or that they were not notified of the medical leave. In the circumstances, I find that the learned sessions judge is right to award the three months medical leave as the plaintiff's loss of income as he should not be deprived of his entitlement of his paid annual leave in the light of the three months medical leave. I do not find a valid reason to intervene with the learned sessions judge's award herein.

CONCLUSION

Appeal No 12B-266 of 2011

[11] For the foregoing reasons, the plaintiff's appeal against quantum on the injury of close fracture of fourth metatarsal with dislocation of fifth metatarsal cuboid joint is dismissed.

[12] In respect of the loss of income/loss of earning capacity, I allow this part of the plaintiff's appeal in the sum of RM55,000 with interest at the rate of 4% from the date of judgment to the date of realisation.

Appeal No 12B-268 of 2011

[13] For the foregoing reasons, the defendant's appeal against quantum of the aforesaid injury is partly allowed and I make the order that the quantum of RM5,000 as ordered by the learned sessions judge for the K-wire fixation is hereby quashed. In respect of the loss of income/loss of earning capacity, the

defendant's appeal is dismissed.

Costs

[14] In the circumstances of this case, I find it appropriate to make no order as to costs of these appeals.

[15] Deposits are hereby ordered to be refunded to respective parties.

Additional claim for RM10,000 for arthritis disallowed, RM5,000 awarded for K-wire fixation quashed, and RM55,000 awarded for loss of earning capacity with interest at 4% from date of judgment to date of realisation.

Reported by Ashok Kumar